

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLEE**

76-7350 76-7305

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

P/S

MEAT SYSTEMS CORPORATION,

Plaintiff-Appellee,

-against-

BEN LANGEN-MOL, INC., a New York corporation,
HOMBURG, B.V. and KNUD-SIMONSEN INDUSTRIES, LTD.,

Defendants,

-and-

BEN-LANGEN-MOL, INC., a Delaware corporation,
Applicant for Intervention-Appellant,

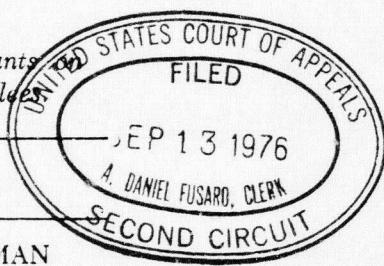
-and-

CARL ADILETTI and STEPHEN ZITIN,
Additional Defendants
Counterclaim-Appellee

BRIEF OF APPELLEES

BELL, WOLKOWITZ, BECKMAN

501 Madison Avenue,
New York, New York 10022
(212) 421-3311



Of Counsel:

SIDNEY DAVID,
RICHARD I. SAMUEL,
LERNER, DAVID, LITTBENBERG & SAMUEL,
A Professional Corporation,
195 Elm Street,
Westfield, New Jersey 07090
(201) 654-5000

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Statement of the Issue
Presented for Review*

Appellees take issue with the Appellant's statement of the issue presented for review. The following are those issues which Appellees consider presented for review.

I. Is the Order appealed from an appealable Order under 28 USC 1291 or 1292 -- does the Court of Appeals have jurisdiction?

II. Was the District Court clearly erroneous, or did the District Court abuse its discretion in denying Appellant's Motion for Intervention made on one business day's notice by Order to Show Cause seven months after Appellant was aware of its right to intervene?

III. Did the Appellant make a sufficient showing below so as to require the District Court to grant its Motion for Intervention?

IV. Would the District Court have been clearly erroneous or abused its discretion if it had denied a preliminary injunction on the basis of laches?

V. Did the Appellant make a sufficient showing below to have required the District Court to grant a preliminary injunction?

*As pointed out in detail in the Brief which follows, Appellees contest the jurisdiction of the Court of Appeals to hear this Appeal. However, for the sake of completeness, and in the event that the Court deems itself empowered to hear the matter, Appellees have addressed themselves to those issues which, Appellees believe, would be present for review.

IN THE
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No. 76-7350

MEAT SYSTEMS CORPORATION,

Plaintiff-Appellee,

-against-

BEN LANGEN-MOL, INC., a New York corporation,
HOMBURG, B.V. and KNUD SIMONSEN INDUSTRIES, LTD.,

Defendants,

-and-

BEN-LANGEN-MOL, INC., a Delaware corporation,

Applicant for Intervention-Appellant,

-and-

CARL ADILETTI and STEPHEN ZITIN,

Additional Defendants on
Counterclaim-Appellees.

BRIEF OF APPELLEES

I. THE COURT OF APPEALS LACKS
JURISDICTION TO CONSIDER THIS
APPEAL AND, THEREFORE, THE APPEAL
SHOULD BE DISMISSED.

(A) In Substance, The District Court
Did Not Deny The Motion To Intervene,
But Merely Put Off The Time Of Hearing
Until September.

The undisputed facts of this case are quite simple, accepting
for the moment as true the allegations of the Affidavit of Mr. Ben

Langen, that the intervenor succeeded to the interests of the party Ben Langen-Mol, Inc., a New York corporation, on or about December 23, 1975, (A-9). Exactly seven months thereafter, on July 23, 1976, the proposed intervenor filed an Order to Show Cause for Intervention coupled with a Motion for Preliminary Injunction (A-4). Judge Connor signed the Order to Show Cause in Judge Knapp's absence and made it returnable on July 27, 1976. It should be noted that the Order to Show Cause was signed late on Friday afternoon, July 23, 1976, and was returnable on Tuesday morning, July 27, at 11:30 a.m., and, under the terms of the Order, responding papers had to be delivered to the offices of opposing counsel on or before 5 p.m. on Monday, July 26, 1976, (A-6).

Against this background, the Court's decision, quoted as followed, must be viewed:

"THE COURT: Well, you made your first mistake. I am denying your motion on the grounds of laches without prejudice to renewing it on proper notice this September.

"You made a miscalculation. You cannot come in with an Order to Show Cause, whip everybody up here in five minutes, when you have known the situation since January."

From the above, it is seen that the Court did not enter any substantive Order going to the merits of Appellant's Motion. What is clear is that the District Court realized that the Appellant had the ability to make a Motion to Intervene since December of

1975 and chose not to do so. On that basis, the Court, as a matter of calendar control, was not going to rush to make a decision with respect to the merits of the Motion on one business day's notice, and in essence put the Motion off until September. While in form the Order appears to be a denial, in substance the entire proceedings, coupled with the Court's statement, make it clear that the Court did not consider the application on its merits, but rather suggested that it be heard in September, but clearly it did not enter a final Order denying the relief requested.

In this respect, the present case is similar to Azar, et al, v. Conley, et al, 480 F.2d. 220 (6th Cir. 1973), in which the District Court dismissed an Amended and Supplemental Complaint without prejudice to amend further. On appeal, the Appellant argued that the District Court's Order was a final Order subject to Appellate review. The Court of Appeals dismissed the appeal for lack of jurisdiction, holding that there was no appealable order "since the District Court dismissed the Amended and Supplemental Complaint without prejudice to amend" further stating:

"It is clear that the plaintiff's pleading may be saved by proper amendment" (480 F.2d at 223).

What is clear from the Azar case is that substance is to govern over form. If the Appellate Court concludes that regardless of the form of the Order, the District Court has not precluded the requested relief, there is no appealable Order. The logic of

this doctrine is supported in the following cases.

Specifically, in Spangler v. United States, 415 F.2d 1242 (9th Cir. 1969), the United States had intervened to bring into the case the entire Pasadena public school system, containing elementary schools, junior high schools, senior high schools and special schools. The Appellees then moved to strike the allegations in the Complaint in Intervention concerning the elementary, junior high schools and special schools and the Motion was granted. The government appealed. The District Court added to its Order, striking from the Complaint in Intervention the statement that the Order "is granted without prejudice to the right of the intervenor to urge the matter again".

The Court of Appeals held that the District Court had spoken on the merits and that the District Court had erroneously concluded that the United States was limited in the relief it could obtain. The Court of Appeals stated:

"The order of the district court was more than a discretionary order controlling the litigation. The district court has given clear indication that the plaintiff high school students and their parents have no standing in the class action to represent students in the other grades, and that the United States has no right by complaint in intervention to expand the litigation to encompass the school system."

In distinguishing the case from other cases, the Court of Appeals continued:

"In our case, the district court, by striking allegations concerning the other units of the

school system, in substance denied the government its right to the prohibitory and mandatory injunctions sought by its complaint in intervention. Whether a ruling is final or not under 28 USC §1291, must be given 'a practical rather than a technical construction', Gillespie v. United States Steel Corp., (1964) 379 U.S. 148, 152, 85 S.Ct. 308, 311, 13 L.Ed.2d 199. As a practical matter, the district court by striking the allegations, has denied the government's request for an injunction." (emphasis supplied)

Furthermore, in the Spangler case, the Appellate Court found that the District Court's denial was a substantive denial and appealable, notwithstanding the statement that the denial was "without prejudice". The Court of Appeals stated:

"We think the effect of the court's order allowing intervenors to again raise the question is similar in effect to an order of the court denying a temporary injunction without prejudice to an application for its renewal. Although the injunction may be granted at a later date, the prejudice suffered after its denial, is sufficient to make the denial an appealable order."

A similar case is Yaffe v. Powers, 454 F.2d 1362 (1 Cir. 1972), in which the District Court in an attempted class action, found that the requirements of Rule 23 FRCP had not been fulfilled and ordered discovery accordingly limited to matters directly related to the named plaintiffs. On appeal, the First Circuit Court of Appeals again discussed the distinction between substantive denial and procedural denial. The Court of Appeals stated

"Had the district court declined to determine a class provisionally, reserving final decision until more facts were presented, see Rule 23(c) (1), then the case would be in a different posture insofar as appealability is concerned. As it is, we hold the district court's order appealable as a denial of the broad injunctive relief sought and proceed to a review of the order on its merits."

Thus, it is clear that the First Circuit also recognizes the distinction between a denial in substance as opposed to a denial before a determination of the merits and related more to questions of procedure or calendar control.

Thus, the issue for appealability of the present appeal does not simply rest on the question of whether the District Court denied the Motion without prejudice to renew, but rather whether or not the District Court gave a clear and final substantive indication denying the Motion to Intervene, thereby entitling Appellant to assume that he had no choice but to appeal the issue.

As pointed out above, the District Court did not discuss the merits of the right to intervene under Rule 24(a). Rather, as a matter of calendar control, and on the basis of laches, the Court decided that there was no reason to hurriedly decide the Motion on an Order to Show Cause basis noticed one business day prior thereto, in a situation where the would-be intervenor had the ability to make the Motion for seven months. Therefore, since the Court below has already indicated its willingness to consider

the merits of the Motion in September on proper notice, it is clear that there has been no final decision adverse to the Appellant which is appealable under 28 USC §1291. The Appeal should, therefore, be dismissed for lack of jurisdiction.

(B) Since The Appellant Was Denied Its Application To Intervene, It Had No Standing To Make A Motion For Preliminary Injunction, The District Court Had No Jurisdiction To Consider Such A Motion, Therefore, There Can Be No Appealable Order Denying Same.

Appellant takes the position that the District Court was clearly erroneous and/or abused its discretion in refusing to consider the Motion for Preliminary Injunction which was filed at the same time as the Motion for Intervention. Having denied the Motion to Intervene, the Court, from a jurisdictional point of view, did not have the power to proceed to decide a Motion for a Preliminary Injunction since at that point, it was being urged by a non-party. Turning it around the other way, it is equally as clear that if the District Court had denied the Motion to Intervene and granted what it thought was a Preliminary Injunction, such injunctive order would have been void for lack of jurisdiction over the person. Clearly, the District Court obtains jurisdiction over the person by virtue of the service of a summons or in the case of intervention or substitution, by the granting of a motion sanctioned by the Federal Rules. If

that motion is denied, and no independent summons is served to initiate a new action, the Court lacks jurisdiction to grant any type of relief with respect to the proposed intervenor and as against any defendant.

It cannot be more emphatically stated that, notwithstanding any discussion by Judge Knapp which reveals his predilection concerning what he would do on a preliminary injunction motion if jurisdiction were obtained (for example, by granting the motion to intervene in September), such predilection cannot rise to the level of an appealable order denying injunctive relief under 28 USC 1292.

II. IF THIS COURT FINDS THAT THE DISTRICT COURT ENTERED AN APPEALABLE ORDER, IT WOULD NOT HAVE BEEN CLEARLY ERRONEOUS OR AN ABUSE OF DISCRETION FOR THE DISTRICT COURT TO HAVE DENIED THE MOTION TO INTERVENE WITHOUT PREJUDICE TO RENEW IT IN SEPTEMBER.

(A) Such An Order Would Not Have Been Clearly Erroneous Or An Abuse Of Discretion Because Of The Number Of Serious Questions Raised In Opposition To The Motion To Intervene.

In the opposition to the Motion to Intervene, numerous reasons were advanced why the intervention would have been improper. In a following section of this Brief, these reasons will be explored in detail, but suffice it to say that the Appellees had opposed

intervention on the following grounds:

(1) Fundamental Due Process. Appellees strenuously argued to the Court below that the Order to Show Cause noticed one business day prior to the hearing did not give them the opportunity to adequately respond and/or pursue the question of whether intervention was proper.

(2) Appellees argued that the interests of the proposed intervenor were adequately represented by the existing parties.

(3) Appellees argued that since the patentee, Homburg, was seeking to be dismissed for lack of jurisdiction, it was questionable as a matter of law whether the alleged exclusive licensee (proposed intervenor) had standing to enforce the patent.

(4) Appellees opposed intervention on the ground that only selective intervention was sought as to the Fifth and Tenth Counterclaims of the proposed intervenor's predecessor in interest.

(5) Appellees opposed intervention on the ground that there was no admissible evidence before the Court establishing the right of the proposed intervenor to stand in the shoes of the alleged predecessor in interest.

(6) Intervention was opposed unless some procedure was developed by which prior discovery could be usable.

In view of all of these grounds, and especially in view of the fact that there was no time between Friday, July 23, 1976, and Tuesday morning, July 27, 1976, for these issues to be

considered, it surely cannot be said that the District Court was clearly erroneous or abused its discretion in deciding not to hear the Motion to Intervene on the merits at that time, but rather, preferred to deny the motion with leave to renew it on proper notice in September.

(B) It Was Certainly Not Clearly Erroneous Or An Abuse Of Discretion For The District Court To Have Denied The Motion To Intervene On The Ground Of Laches.

As the District Court correctly pointed out, the proposed intervenor allegedly had the status to move to intervene since December of 1975. Having chosen not to intervene for seven months, it was not clearly erroneous or an abuse of discretion for the District Court to have found that laches barred the immediacy of the Motion for Intervention.

III. THE SHOWING BELOW BY THE APPELLANT WOULD NOT HAVE JUSTIFIED THE GRANTING OF A MOTION TO INTERVENE.

Although, as pointed out above, Appellees are of the firm opinion that the Court below did not get to the merits of the intervention, because of the Appellant's Brief, Appellees feel constrained to further show that had the merits been considered, the Appellants would have failed to sustain their Motion to Intervene.

Specifically, with respect to the question of adequate representation by existing parties, the last sentence of Rule 24(a) FRCP does not permit intervention as of right if applicant's interest is adequately represented by existing parties. In opposing the Motion to Intervene, Appellees argued to the District Court that in the present case, Ben Langen-Mol, Inc., a New York corporation, is an existing defendant in the action. Ben Langen-Mol, Inc., a New York corporation, and Ben Langen-Mol, Inc., a Delaware corporation, who seeks to intervene, have the same counsel, namely Howard G. Kristol, Esq., of Reboul, MacMurray, Hewitt, Maynard & Kristol. Furthermore, the Counterclaims which Ben Langen-Mol, Inc., a Delaware corporation, seeks to introduce into the present litigation by intervention are already in litigation between the existing parties as follows.

The first Counterclaim which Belam-Delaware seeks to introduce is exactly the same Counterclaim which Belam-New York presently has pending against the Additional Defendants on Counterclaim. The second Counterclaim which Belam-Delaware seeks to introduce by virtue of the Motion to Intervene is for a holding of infringement and validity of the '860 patent, which is already being litigated between plaintiff and the defendant Homburg, the patent owner. The third Counterclaim which Belam-Delaware seeks to introduce by intervention is a Counterclaim for infringement of the '134 patent, which is already the subject of plaintiff's

Fifth Cause of Action for a declaration of non-infringement and invalidity lodged against the assignee of the patent, Homburg, and Ben Langen-Mol, Inc., a New York corporation.

Therefore, and as argued to the District Court, all of the interests of the proposed intervenor are being adequately represented by existing parties, and the Motion to Intervene could have been denied on this basis alone. Indeed, the diligence of Belam-New York's prosecution in these matters was amply demonstrated by the fact that Howard Kristol conducted depositions of Carl Adiletti on December 29, 1975, and January 13, 1976, on behalf of Ben Langen-Mol, Inc., a New York corporation, after Ben Langen-Mol, Inc., a New York corporation, had allegedly transferred its business interests to Ben Langen-Mol, Inc., a Delaware corporation.

In Appellant's Brief, Appellant first argues that Homburg, the patent owner, cannot adequately represent Appellant's interests with respect to the patents since, by seeking to be dismissed for lack of jurisdiction in this action they have in Appellant's view demonstrated an unwillingness to prosecute infringers. As a factual matter, this is incorrect in view of the Affidavit of Ben Langen (A-17) which states as follows:

"Upon information and belief, Homburg's counsel corresponded with all persons thought to be infringing the patents and eventually commenced actions against two infringers after they were unable to reach a satisfactory accord with them. I am informed that these actions, Homburg, B.V., v. Bryan Packing Company, (Civ. No. EC 76-598)

and Homburg, B.V., v. Baltz Brothers Packing Co., (Civ. No. 76-133-NA-CV) are presently pending in the United States District Court for the District of Mississippi and Middle Tennessee, respectively"

Thus, contrary to the implication of Appellant's Brief, the facts are that the patent owner, Homburg, is attempting to enforce the patents, and at the very least, there is a factual question which would have to be resolved as to whether or not the interests of the proposed intervenor were adequately being represented by the patent owner, Homburg.

Also, the Appellant argues that Belam-New York cannot adequately represent the interests of Belam-Delaware because Belam-New York is a "shell corporation" and, in fact, may no longer be the proper party pursuant to Rule 19 FRCP to assert claims in view of the assignment of certain assets thereof to Belam-Delaware. Since none of the underlying documents relating to the alleged transfer between Belam-New York and Belam-Delaware were ever presented to the District Court, it is clear that there would never have been sufficient evidence to support a finding by the District Court that Belam-Delaware's interests were not adequately represented by Belam-New York. In fact, the only evidence before the Court below was that Belam-New York, through its counsel, Howard Kristol, was actively taking depositions after the alleged transfer which not only negated the argument of the proposed intervenor, but seemed to positively demonstrate the opposite.

Appellees also opposed intervention on the ground that the Court should not grant the selective intervention sought by the Appellant. Specifically, as one viewed the proposed Answer and Counterclaims of Belam-Delaware, attached to the Order to Show Cause papers, it was clear that Belam-Delaware sought to intervene as a defendant only with respect to the Fifth and Tenth Causes of Action pleaded by the plaintiff, Meat Systems. Since these causes of action are essentially a declaratory judgment seeking a holding of patent invalidity and non-infringement, an intervention by Belam-Delaware as a nominal defendant effectively would have placed Belam-Delaware in the position of a party plaintiff seeking to enforce the patents.

However, Belam-Delaware did not seek to intervene with respect to the remaining causes of action lodged against Belam-New York, which causes of action seek a holding of liability, compensatory and punitive damages, etc., as against Belam-New York. Paragraph 4 of Ben Langen's affidavit (A-9), asserts that in connection with the transaction between Belam-New York and Belam-Delaware, Belam-Delaware acquired certain of the assets and assumed certain of the liabilities of Belam-New York. From the nature of the Motion to Intervene, and its failure to seek to intervene in toto, plaintiff assumed, but of course does not know for sure, that Ben Langen-Mol, Inc., a New York corporation, transferred those things of value to Belam-Delaware, while

saddling Belam-New York, a non-operating company, with the potential liabilities associated with the non-assumed causes of action against Belam-New York. If this is the case, there is a serious question of a possible fraudulent conveyance within the meaning of the Business Corporation Law (BCL) of the State of New York, in which Belam-New York seeks to make itself judgment-proof against plaintiff, Meat Systems. From Appellant's Brief, where it is stated on page 12 that Belam-New York is only a shell corporation, the possibility urged before the District Court may, in fact, be a reality.

In this connection, Rule 1002 of the Federal Rules of Evidence is particularly significant in the sense that original documents are required to prove the contents of a writing. It was urged before the District Court below, that before the Court should allow intervention, especially on a piecemeal basis, it should require the proposed intervenor to produce the admissible evidence (the underlying documents) and not rely upon inadmissible evidence in the form of affidavits as to the contents of the underlying documents in support of an alleged right to intervene. This is particularly true in the present case where there was an attempted Motion to Intervene on a piecemeal basis, in which case the underlying documents would be especially significant for the

reasons outlined above.¹

In view of all of the above, if this Court finds that the District Court did, in fact, deny a Motion to Intervene on the merits, it is believed that such a decision would not have been clearly erroneous or an abuse of discretion.

IV. THE ISSUE OF THE PRELIMINARY INJUNCTION.

As stated heretofore, it is the Appellees' position that the District Court, having denied the Motion to Intervene, had no jurisdiction to either grant or deny a Motion for a Preliminary Injunction being urged by a company which has not been permitted to intervene. The fact that the District Court may have indicated what he might have ruled had the Motion for a Preliminary Injunction been before him, such predilection on or off the record is

¹Of further significance in this regard, the day after the hearing on the Motion for Intervention, a Notice of Deposition was served on Belam-New York to take the deposition of Ben Langen who submitted the only affidavit in support of the Motion to Intervene and who was in court during the hearing before the District Court. Counsel for Meat Systems was advised that Mr. Langen had already left the country and was not available for depositions. To this day, Meat Systems has been unable to take the deposition of the sole affiant in support of the Motion for Intervention, notwithstanding the fact that the proposed intervenor moved for an Order to Show Cause, gave Appellees one day to respond, and moved for a preference on this Appellate Review after waiting seven months to file their Motion to Intervene.

not a denial of injunctive relief reviewable in Appellate Court under 28 USC 1292.

Nevertheless, if for some reason, this Court should somehow find that the District Court denied the Motion for Preliminary Injunction on the basis of laches, as apparently urged by Appellant, it is submitted that such a denial would not have been clearly erroneous or an abuse of discretion.

Lest it be overlooked, the Court's attention is again directed to the fact that the defendants in this action, and including the proposed intervenor (the Appellant herein) had complete knowledge of the alleged improper activities of Meat Systems Corporation and the alleged improper activities of Carl Adiletti since at least as early as December of 1975 when Mr. Adiletti was deposed and the facts being relied on in the present proceedings were revealed. Neither defendants nor the present Appellant made any Motion for Intervention or for Preliminary Injunction. Furthermore, the '860 patent upon which the Motion for Preliminary Injunction was based, issued on January 27, 1976. Thus, the Appellant herein could have made a Motion to Intervene and for a Preliminary Injunction under the patent from that date on, but chose not to do so. Additionally, the defendant Ben Langen-Mol, Inc., a New York corporation, absolutely disavowed any involvement with the Tenth Cause of Action which the plaintiff Meat Systems added by Amended Complaint against Homburg seeking a

declaration of invalidity and non-infringement of the '860 patent (see Mr. Kristol's letter of April 7, 1976, (A-101)). Finally, the patentee, itself, Homburg, has from the inception of this lawsuit been diligently seeking to remove itself on the basis of lack of jurisdiction.

In reliance upon the above-stated facts, the plaintiff, Meat Systems, continually enlarged its business operations and entered into further contractual obligations with third parties, having detrimentally relied on the total inactivity of all the parties who might have sought preliminary relief, especially in view of the knowledge on the part of Meat Systems that the patentee, Homburg, and Belam-New York and Belam-Delaware have known for months and months of the sales of allegedly infringing apparatus. Such parties, and particularly the present Appellant, should, under traditional principles of laches and estoppel, be estopped from now seeking preliminary relief, the effect of which, if granted, would have drastically interferred with the rights of Appellees and drastically interferred with contractual relationships involving third persons (Meat Systems' customers) which were entered into by Meat Systems in reliance on Appellant's own delay.

Thus, the Court below would have been fully justified in denying the Motion for Preliminary Injunction on laches had the Motion been properly before it. Such a decision would not have

been clearly erroneous nor an abuse of discretion and would have been clearly sustainable even if the District Court did not review other applicable case law such as Carter-Wallace, Inc., v. Davis-Edwards Pharmaceutical Corp., 443 F.2d 867 (2 Cir. 1971), regarding the standard to be applied when considering preliminary injunctions in patent cases.

V. IF THE DISTRICT COURT HAD CONSIDERED THE MOTION FOR PRELIMINARY INJUNCTION, THE SHOWING ON BEHALF OF THE PROPOSED INVENTOR WOULD NOT HAVE BEEN SUFFICIENT IN ANY EVENT TO COMPEL THE DISTRICT COURT TO GRANT A PRELIMINARY INJUNCTION UNDER THE PATENT.

Under Carter-Wallace, supra, and the subsequent opinion in the same case at 474 F.2d 529 (2 Cir. 1973) in this Circuit, a preliminary injunction in a patent case is only granted if (1) there is a prior adjudication of validity, (2) long acquiescence in the industry, or (3) when the patent is without question valid and infringed.

As was argued to the District Court, there has been no prior decision of validity of this patent, there has been no acquiescence in the industry (nor has there been a suggestion of same by Appellant), and nor can it be said that the patent is valid and infringed beyond question.

On the issue of validity, numerous defenses of invalidity have been raised as evidenced by the answers to interrogatories in the companion customer actions being defended in Tennessee and Mississippi (A-78 - A-123). With respect to the issue of infringement, the only evidence before the District Court was an affidavit of the president of the proposed intervenor, a non-attorney and non-patent attorney, who merely stated in conclusory language that there was an infringement. To the contrary, and in opposition to the Motion, the District Court had before it a four-page opinion of non-infringement authored by a patent attorney (A-140 - A-143) which (1) traced the file wrapper history of the patent involved, (2) pointed out why under the principles of file wrapper estoppel the applicant was limited to a diamond-shaped paddle in its patent coverage, and (3) pointed out how, based on such file wrapper estoppel, the alleged infringer, Meat Systems, had carefully avoided using such diamond-shaped paddle construction in connection with the sale of its machines.

Given that evidence, can it be seriously argued that the District Court would have been clearly erroneous or would have abused its discretion had it decided to deny a Motion for Preliminary Injunction with respect to this patent. Clearly, the evidence before the District Court would not even have been sufficient to carry the burden of "likelihood of success" which is normally required in preliminary injunction, yet alone the

higher burden of proof required in the Second Circuit under the
Carter-Wallace decision.

CONCLUSION

In view of the above, it is submitted that the Appeal should be dismissed for lack of jurisdiction, and, in the alternative, denied.

DATED: September 3, 1976.

Respectfully submitted,

BELL, WOLKOWITZ, BECKMAN & KLEE
Attorneys for Appellees
501 Madison Avenue
New York, New York 10022
(212) 421-3311

OF COUNSEL:

SIDNEY DAVID
RICHARD I. SAMUEL
LERNER, DAVID, LITTBENBERG & SAMUEL
A Professional Corporation
195 Elm Street
Westfield, New Jersey 07090
(201) 654-5000

IN THE

United States Court of Appeals

DOCKET No. 2nd Circuit
76-7350

PROOF OF SERVICE FORM
New Jersey Appellate Printing Co., Inc.
177 Ryan Street
South Plainfield, N. J. 07080
(201) 753-0200

Meat Systems Corporation

vs.

Ben Langen-Mol, Inc.

STATE OF NEW JERSEY)
:ss.
COUNTY OF MIDDLESEX)

PROOF OF SERVICE

I, RONALD D. ANZIVINO, of full age, being duly sworn according to law upon my oath, depose and say:

1. I am the President of New Jersey Appellate Printing Co., Inc., a New Jersey corporation, the principal place of business of which is located at 177 Ryan Street, South Plainfield, New Jersey

2. On the 10 day of Sept. 1976, I placed in the Post Office at South Plainfield, New Jersey, a package containing

2 copies of Brief for Appellees

first class mail, addressed:

Reboul, MacMurray, Newitt, Maynard & Kristor, Esq.
75 Rockefeller Plaza
New York, NY 10019

Brooks, Haidt, Haffner, Delahunt, Esqs. 99 Park Avenue, NYC 10016

Browdy, Neimark, Esq. Munsey Bldg. Washington, D. C. 20004

Sworn and subscribed to
before me this 10 day
of Sept., 1976.
JAMES B. RATTIGAN
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Dec. 19, 1980

RONALD R. ANZIVINO

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